

MUTHAMAH KALIAPPEN

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v.

PP

HIGH COURT MALAYA, ALOR STAR

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ZAINAL ADZAM J

[CRIMINAL APPEAL NO: 42-15-2005]

21 MARCH 2007

CRIMINAL PROCEDURE: *Bail - Cancellation and withdrawal - Application for - RM25,000 forfeited by Sessions Court for non-attendance of bailor and accused - Whether should be returned to appellant - Duties of a bailor - Whether bailor duty bound to ensure accused attend court on fixed dates - Failure to inform Sessions Court of accused's situation - Whether a serious dereliction of duty as bailor - Notice of Bailor not served on appellant - Whether due to bailor's own mistake in giving old address - Whether there was sufficient cause why bail should not be forfeited - Whether there were extenuating circumstances in favour of appellant - Whether there were grounds to interfere with Sessions Court's decision to forfeit*

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CRIMINAL PROCEDURE: *Bail bond - Forfeiture of - Appeal by bailor against order of Sessions Court judge - RM25,000 forfeited by Sessions Court for non-attendance of bailor and accused - Whether should be returned to appellant - Duties of a bailor - Whether bailor dutybound to ensure accused attend court on fixed dates - Failure to inform Sessions Court of accused's situation - Whether a serious dereliction of duty as bailor - Notice of Bailor not served on appellant - Whether due to bailor's own mistake in giving old address - Whether there was sufficient cause why bail should not be forfeited - Whether there were extenuating circumstances in favour of appellant - Whether there were grounds to interfere with Sessions Court's decision to forfeit*

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The appellant, a bailor for the accused, applied to the Sessions Court, Sungai Petani for bail to be cancelled or withdrawn until the settlement of the cases against the accused in Kuala Lumpur where the accused was held under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 for 60 days. The appellant also prayed for the bail of RM25,000 forfeited by the Sessions Court for the non-attendance of the appellant as the bailor and accused be returned to the appellant. The appellant's application was dismissed by the Sessions Court. The appellant therefore filed this appeal. The arguments raised by the appellant

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- A were: (1) the appellant could not attend the Sessions Court on 11 April 2005 as both she and the accused had been remanded for 11 days by the police on 6 April 2005; (2) the accused was further remanded until 28 July 2005 and on that date he was further detained; (3) the appellant did not receive any Notice to
- B Bailor from the Sessions Court because of her mistake in giving her old address to the Sessions Court earlier (4) the appellant had no intention of misleading the Sessions Court as being a lay person she had mistakenly given her old address when her identity card was requested by the Sessions Court for purposes of the bail
- C bond; (5) the Sessions Court judge wrongly refused to accept a statement from the bar by the appellant's counsel that both the appellant and the accused did inform the police about their case in the Sessions Court, Sungai Petani when they were in remand; (6) the appellant was illiterate and the contents of her affidavit had to be translated to her by her solicitors.
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Held (dismissing the appeal):

- (1) The Notice to Bailor for the appellant to show cause issued by the Sessions Court could never be served on the appellant as the address given by the appellant to the Sessions Court was *ab initio* not the address she was staying. This fact was known to the appellant even before she and the appellant were arrested. That was because the appellant herself stated in her affidavit that she had applied for a new identity card with her new address sometime in March 2005. The appellant at no time before or after that informed the Sessions Court about her change of address. A layman she may be as submitted, but she was fully aware of the importance of having her new address in her identity card. She could not therefore blame the Sessions Court for not receiving any Notice to Bailor. (para 7)
- (2) The appellant was released on 17 April 2005 *ie*, just six days after the accused was required to attend the Sessions Court. Upon her release the appellant did nothing to inform the Sessions Court about her arrest and also the accused's arrest and further remand. According to the appellant she had been depressed for two months after her father's death. Her father died on 8 May 2005 at the age of 89 years. A death at that age would not normally be one that was totally unexpected or shocking for the appellant to be depressed and incapable for two months. However, more importantly, the appellant clearly

did nothing from the time she was released on 17 April 2005 till 8 May 2005, the day her father died, to inform the Sessions Court the reason for the non-attendance of the accused or his whereabouts. (para 8)

(3) The appellant was dutybound as the bailor to ensure that the accused attend court on the dates fixed by the Sessions Court and when the accused could not attend it was the duty of the appellant to inform the court the reasons. The duty of the appellant did not cease when she and the accused were in the police custody on the date fixed for the hearing. She was bound under the obligations of the bail bond for the duration of the case against the accused or until released by the Sessions Court. As an undischarged bailor she was fully aware that the case against the accused was at all times still pending. Further, the argument that the appellant was an illiterate person could not stand as it was recorded on the bail bond that the contents were translated and explained to her by the Sessions Court Tamil interpreter. (para 9)

(4) The submission that the Sessions Court wrongly refused to accept her solicitor's statement from the bar had no merit. The Sessions Court rightly refused to accept the statement that the appellant tried to inform the police about the accused having to attend court on 14 April 2005. That statement was an afterthought as it could easily be averred in her affidavit which obviously was prepared with the assistance of her solicitors. Upon her release on 17 April 2005, the appellant did not inform the Sessions Court about the accused's predicament. The appellant chose to do nothing upon her release and that was a serious dereliction of her duty to the Sessions Court as a bailor. It was aggravated by the fact that the appellant at the material time was fully aware that the Sessions Court could not reach her as the address on record with the Sessions Court was an address which she had vacated five years before. (para 10)

(5) The appellant had failed to show any sufficient cause why bail should not be forfeited. The Sessions Court's decision on this issue was a correct one. It was a fact that the appellant and the accused could not attend the Sessions Court on 14 April 2005 as they were both arrested and under the custody of the police. However the appellant was blatantly wanting in diligence as on the first available opportunity and then

- A on wards she did not make any attempt to inform the Sessions Court of the accused's situation. She could not use the arrest to exonerate herself. It was her duty under the bail bond to inform the Sessions Court when the situation permits of that matter. She failed in her obligation as a bailor at her own peril. (paras 11 & 12)
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- (6) There were no extenuating circumstances in favour of the appellant. As a bailor she should be aware that it was an extremely serious duty which should not be taken lightly.
- C There were no grounds to interfere with the Sessions Court's decision to forfeit the full sum of the RM25,000 bond. (para 12)

Case(s) referred to:

- Alauddin v. Emperor AIR [1925] Patna 389(2) (refd)*
- D *Datuk Hj Harun Hj Idris (Criminal Appeals No: 19-1976 & 11-1977) (Unreported) (refd)*
- R v. Southampton Justices, ex p Green [1975] 2 All ER 1073 (refd)*
- R v. Waltham Forest Justices, ex p Parfrey [1980] 1 QBD 11 (refd)*
- Valliamai v. PP [1962] 28 MLJ (refd)*
- E *Yap Yin Kok v. PP [1988] 1 CLJ 213; [1988] 2 CLJ (Rep) 849 HC (refd)*

Legislation referred to:

- Criminal Procedure Code, s. 404
- Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 3(1)
- F Penal Code, s. 376

For the appellant - Sutheswary Perumal; M/s Suthes & Assoc

For the respondent - Nor Shuhada Mohd Yatim DPP

Reported by Suhainah Wahiduddin

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JUDGMENT

Zainal Adzam J:

- H [1] The appellant, the bailor for one Jievan a/l Perumal (the "accused"), applied to the Sessions Court, Sungai Petani for bail be cancelled or withdrawn until the settlement of the cases against the accused in Kuala Lumpur, where the accused was held under the Emergency (Public Order and Prevention of Crime) Ordinance
- I 1969 for 60 days. The appellant also prayed for the bail of RM25,000 forfeited by the Sessions Court for the non-attendance

of the appellant as the bailor and accused be returned to the appellant. The appellant's application was on 14 August 2005 dismissed by the Sessions Court. The appellant therefore filed this appeal.

[2] The case for the appellant, briefly, are as follows: The appellant on 14 February 2005 stood as a bailor in the Sessions Court for the accused who was charged under s. 376 of the Penal Code. The bail was for the amount of RM25,000. The case against the accused was adjourned to 11 April 2005. The appellant was given a written slip indicating that date by the Sessions Court. However, before the said date, *viz.* on 6 April 2005, the appellant and the accused were arrested by the police at Serdang Baru on suspicion of drug possession. They were both remanded for 11 days. The appellant was released without any charge being preferred against her on 17 April 2005. The accused however was further remanded at various police stations throughout the country until 28 July 2005.

[3] The appellant averred in her supporting affidavit that after 11 April 2005 she did not receive any Notice to Bailor from the Sessions Court as the address that she gave the Sessions Court during the execution of the bail bond was her old address as stated in her old identity card. She and her family had moved from that old address about five years before that. Furthermore, the appellant stated that on 8 May 2005 her father passed away and upon the demise of her father she became deeply depressed and only recovered about two months after that. That was the reason why she did not go to the Sessions Court and follow-up with the subsequent dates fixed for the case against the accused. On 28 July 2005, according to the appellant, the accused was then detained for 60 days under s. 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

[4] The arguments on behalf of the appellant as forwarded by her learned counsel can be summarised as follows: The appellant and the accused could not attend the Sessions Court on 11 April 2005 as both of them were being remanded for 11 days by the police from 6 April 2005. The accused was further remanded until 28 July 2005 and on that date he was further detained for 60 days under the Emergency Ordinance. The appellant did not receive any Notice to Bailor from the Sessions Court because of her mistake in giving her old address to the Sessions Court earlier. Other than

- A that it was argued on behalf of the appellant that she had no intention of misleading the Sessions Court as being a lay person she mistakenly gave her old address when her identity card was requested by the Sessions Court for purposes of the bail bond. The other ground put forward was that the Sessions Court judge
- B wrongly refused to accept a statement from the bar by the appellant's counsel that both the appellant and the accused did inform the police about their case in the Sessions Court, Sungai Petani when they were in remand. The Sessions Court refusal to consider the statement from the bar was because it was not
- C averred anywhere in the appellant's affidavit in support or in the accused's affidavit. Lastly, it was submitted that the appellant is illiterate and the contents of her affidavit had to be translated to her by her solicitors.

- D [5] The law on forfeiture of all bonds is found in s. 404 of the Criminal Procedure Code, which provides:

404(1) Whenever:

- E (a) it is proved to the satisfaction of the Court by which a bond under this Code has been taken; or
- (b) when the bond is for appearance before a Court, it is proved to the satisfaction of that Court,

- F that the bond has been forfeited the Court shall record the grounds of such proof and may call upon any person bound by the bond to pay the penalty thereof or to show cause why it should not be paid.

- G Ong J in *Valliamai v. Public Prosecutor* [1962] 28 MLJ stated the procedure as follows:

- H ... The relevant provisions relating to forfeiture of a bond are in section 404 of the Criminal Procedure Code, which provides for "any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid." This makes it clear that, upon sufficient cause shown, forfeiture may be waived altogether, while subsection (v) further states in specific terms that the Court has a discretion to "remit any portion of the penalty mentioned and enforce payment in part only." Careful consideration, therefore, ought to be given by Magistrates to the question in two stages first has sufficient cause been shown
- I against forfeiture; secondly, if not, are the circumstances such that the whole sum of the penalty ought to be enforced. This postulates an active exercise of the court's discretion ...

“Sufficient cause” is not defined, so what is “sufficient cause” depends on the circumstances of each case. A

[6] The first ground raised by the appellant was based on the Indian case of *Alauddin v. Emperor* AIR [1925] Patna 389(2). The head note in that case reads: B

Bail bond should not be forfeited for failure of the surety to produce the accused person, where the failure to produce is due to an act of law, eg, his being arrested.

That case was a revision by the High Court of a Magistrate Court decision forfeiting the full amount of the bond when the accused failed to attend court. The appellant and his fellow sureties were called to show cause why their bail surety should not be forfeited. Notwithstanding the applicant’s explanation that he was in fact unable to produce the accused as the accused was under arrest elsewhere, the Magistrate ordered the full amount of the bond be forfeited. On revision, the High Court reversed the Magistrate’s order and refunded the full amount of the bond. C D

[7] However, in the present appeal, the Notice to Bailor for the appellant to show cause issued by the Sessions Court could never be served on the appellant as the address given by the appellant to the Sessions Court was *ab initio* not the address she was staying. This fact was known to the appellant even before she and the appellant were arrested. That was because the appellant herself stated in her affidavit that she applied for a new identity card with her new address sometime in March 2005. The appellant at no time before or after that informed the Sessions Court about her change of address. A layman she may be as submitted by her counsel, but she was fully aware of the importance of having her new address in her identity card. She cannot therefore blame the Sessions Court for not receiving any Notice to Bailor. E F G

[8] As stated by the appellant, she was released on 17 April 2005, ie, just six days after the accused was required to attend the Sessions Court. Upon her release the appellant did nothing to inform the Sessions Court about her arrest and also the accused’s arrest and further remand. According to the appellant she was so depressed for three months after her father’s death. Her father died on 8 May 2005 at the age of 89 years. The death at that age would not normally be one that is totally unexpected or shocking for the appellant to be depressed and incapable for two H I

A months. However, more importantly, the appellant clearly did nothing from the time she was released on 17 April 2005 till 8 May 2005, the day her father died, to inform the Sessions Court the reason for the non-attendance of the accused or his whereabouts.

B [9] The appellant was duty bound as the bailor to ensure that the accused attend court on the dates fixed by the Sessions Court and where the accused could not attend it was the duty of the appellant to inform the court the reasons. The duty of the
C appellant did not cease when she and the accused were in the police custody on the date fixed for the hearing. She was bound under the obligations of the bail bond for the duration of the case against the accused or until released by the Sessions Court. As
D an undischarged bailor she was fully aware that the case against the accused was at all times still pending. The terms of the bail bond (taken from the Sungai Petani Sessions Court records) as executed by her are clear:

E ... Saya Muthamah a/p Kaliappen, (K/P: 681207-02-5528) yang beralamat di No. 4116 Seksyen 6, 43300 Seri Kembangan dengan ini mengaku sayalah penjamin bagi yang tersebut namanya di atas bahawa ia akan hadir di hadapan Mahkamah Sungai Petani pada 26/2/05 yang akan datang atau dengan jalan lain apabila dipanggil bagi menjawab pertuduhan itu yang atasnya ia telah dihukum
F untuk dibicarakan dan bahawa ia akan terus hadir sehingga dipanggil oleh Mahkamah; dan sekiranya ia mungkir di dalam perkara ini saya dengan ini mengikat diri saya melucutkan hak wang saya kepada Yang Dipertuan Agong sebanyak RM25,000 ringgit.

Bertarikh 14 Februari 2005 ...

G Chan Sek Keong JC in *Yap Yin Kok v. PP* [1988] 1 CLJ 213; [1988] 2 CLJ (Rep) 849 referring to the relevant part of the bail bond in the Singapore Criminal Procedure Code said:

H In my view, there is no room for doubt as to the meaning of these words. They impose on the surety an obligation to produce the appellant at every stage of the hearing of the appeal, including any adjournments thereof from time to time, for whatever reason, until its final disposal ...

I The argument that the appellant is an illiterate person cannot stand as it was recorded on the bail bond that the contents were translated and explained to her by the Sessions Court tamil interpreter.

[10] The submission that the Sessions Court wrongly refused to accept her solicitor's statement from the bar to my mind has no merit. The Sessions Court rightly refused to accept the statement that the appellant tried to inform the police about the accused having to attend court on 14 April 2005. That statement in my considered opinion is an afterthought as it could easily be averred in her affidavit which obviously was prepared with the assistance of her solicitors. Furthermore, if it was true that the appellant was so concerned about the attendance of the accused in the Sessions Court during their detention then why on the first available opportunity upon her release on 17 April 2005 did the appellant not inform the Sessions Court about the accused's predicament. The appellant chose to do nothing upon her release and that was a serious dereliction of her duty to the Sessions Court as a bailor. It was aggravated by the fact that the appellant at the material time was fully aware that the Sessions Court could not reach her as the address on record with the Sessions Court was an address which she had vacated five years before.

In the case of *Datuk Haji Harun b. Haji Idris* (Federal Court Criminal Appeals Nos. 19 of 1976 and 11 of 1977) Suffian LP in his address to the bailors emphasised:

The public should realise that standing bail for somebody is a real responsibility and is not to be lightly taken. If a bailor were to fail to produce the accused in court, then he should realise that he will have something serious happen to him.

The observations of Donaldson LJ in *R. v. Waltham Forest Justices, ex p. Parfrey* [1980] 1 QBD 11 is also relevant to this appeal:

The obligation entered into by someone who enters into a recognisance as a surety is a very serious obligation indeed. I hope that nothing I say will suggest the contrary. There is an obligation on a surety to be fully satisfied that he or she can meet the liability which will arise if the accused person does not surrender to his bail. This failure to surrender is not a theoretical possibility, though a surety may think it is. The unhappy event of arrested persons not surrendering happens frequently. There is a real risk. Indeed it is difficult to conceive of a set of circumstances in which a surety can be absolutely sure that the accused will surrender to his bail. So let no one think that this is an obligation which can be entered into lightly. Furthermore, the burden of satisfying a court that the full sum should not be forfeit is a very heavy one, so again let no one think that they can

- A simply appear before the magistrates and tell some hard luck story, whereupon the magistrates will say, 'Well, be more careful in future.' We are not dealing with that character of obligation at all.
- B [11] Under the circumstances I find that the appellant had failed to show any sufficient cause why bail should not be forfeited. The Sessions Court's decision on this issue was a correct one. That brings us to the second stage as laid down by *Valliamai v. PP*, ie, whether the circumstances are such that the whole sum of penalty ought to be enforced. On this issue, Lord Denning MR in *R v. Southampton Justices, ex p. Green* [1975] 2 All ER 1073, 1077-1078 stated as follows:
- C ... By what principles are the justices to be guided? They ought, I think, to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance of the accused man, it might be proper to remit it entirely ...
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- E
- F [12] It is a fact that the appellant and the accused could not attend the Sessions Court on 14 April 2005 as they were both arrested and under the custody of the police. However, the appellant was blatantly wanting in diligence as on the first available opportunity and then onwards she did not make any attempt to inform the Sessions Court of the accused's situation.
- G She cannot use the arrest to exonerate herself. In the circumstances of this case, it was her duty under the bail bond to inform the Sessions Court when the situation permit of that matter. She failed in her obligation as a bailor at her own peril. That is because she was fully aware at all times that the bail bond carries a penalty of RM25,000. In this appeal I cannot find any extenuating circumstances in favour of the appellant. As a bailor she should be aware that it is an extremely serious duty which should not be taken lightly. I therefore find that there are no grounds to interfere with the Sessions Court's decision to forfeit the full sum of the RM25,000 bond. This appeal is therefore dismissed.
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